

class of works for the ensuing 3-year period.”<sup>2</sup>

The first section 1201 rulemaking took place three years ago, and on October 27, 2000, the Librarian announced that noninfringing users of two classes of works would not be subject to the prohibition on circumvention of access controls.<sup>3</sup> Exemptions to the prohibition on circumvention remain in force for a three-year period and expire at the end of that period. The Librarian is required to make a determination on potential new exemptions every three years.

#### *B. Responsibilities of Register of Copyrights and Librarian of Congress*

The purpose of the rulemaking proceeding conducted by the Register is to determine whether users of particular classes of copyrighted works are, or in the next three years are likely to be, adversely affected by the prohibition in their ability to make noninfringing uses of copyrighted works. In making her recommendation to the Librarian, the Register must carefully balance the availability of works for use, the effect of the prohibition on particular uses and the effect of circumvention on copyrighted works.

#### *C. The Purpose and Focus of the Rulemaking*

1. *Purpose of the Rulemaking.* As originally drafted, section 1201(a)(1) provided simply that “No person shall circumvent a technological measure that effectively controls access to a work protected under this title.” However, in response to concerns that section 1201, in its original form, might undermine Congress’ commitment to fair use if developments in the marketplace relating to use of access controls result in less access to copyrighted materials that are important to education, scholarship, and other socially vital endeavors, it was determined that a triennial rulemaking proceeding should take place to monitor the use of access controls. If the rulemaking record revealed that access was being unduly restricted, e.g., by elimination of print or other hard-copy versions, permanent encryption of all electronic copies or adoption of business models that restrict distribution and availability of works, then users of particular classes of works who are engaging in noninfringing uses

of those works would be allowed to circumvent access controls without running afoul of the prohibition in section 1201(a)(1). The rulemaking proceeding, to be conducted by the Register of Copyrights, was considered a “fail-safe” mechanism, monitoring developments in the marketplace for copyrighted materials, and would allow the enforceability of the prohibition against the act of circumvention to be selectively waived, for limited time periods, if necessary to prevent a diminution in the availability to individual users of a particular category of copyrighted materials.

2. *The Necessary Showing.* Proponents of an exemption have the burden of proof. In order to make a prima facie case for an exemption, proponents must show by a preponderance of the evidence that there has been or is likely to be a substantial adverse effect on noninfringing uses by users of copyrighted works. De minimis problems, isolated harm or mere inconveniences are insufficient to provide the necessary showing. Similarly, for proof of “likely” adverse effects on noninfringing uses, a proponent must prove by a preponderance of the evidence that the harm alleged is more likely than not; a proponent may not rely on speculation alone to sustain a prima facie case of likely adverse effects on noninfringing uses. It is also necessary to show a causal nexus between the prohibition on circumvention and the alleged harm.

Proposed exemptions are reviewed *de novo*. The existence of a previous exemption creates no presumption for consideration of a new exemption, but rather the proponent of such an exemption must make a prima facie case in each three-year period.

3. *Determination of “Class of Works”.* A “particular class of works” to be exempted from the prohibition on circumvention must be based upon attributes of the works themselves, and not by reference to some external criteria such as the intended use or users of the works. The starting point for any definition of a “particular class” of works in this rulemaking must be one of the categories of works set forth in section 102 of the Copyright Act, but those categories are only a starting point and a “class” will generally constitute some subset of a section 102 category. The determination of the appropriate scope of a “class of works” recommended for exemption will also take into account the likely adverse effects on noninfringing uses and the adverse effects an exemption may have

on the market for or value of copyrighted works.

While starting with a section 102 category of works, or a subcategory thereof, the description of a “particular class” of works ordinarily should be further refined by reference to other factors that assist in ensuring that the scope of the class addresses the scope of the harm to noninfringing uses. For example, the class might be defined in part by reference to the medium on which the works are distributed, or even to the access control measures applied to them. But classifying a work solely by reference to the medium on which the work appears, or the access control measures applied to the work, would be beyond the scope of what “particular class of work” is intended to be. And it is not permissible to classify a work by reference to the type of user or use (e.g., libraries, or scholarly research).

#### *D. Consultation With the Assistant Secretary for Communications and Information*

As required by section 1201(a)(1)(C), the Register consulted with the Assistant Secretary for Communications and Information of the Department of Commerce, meeting with her at the outset of the rulemaking proceeding and after the record had been compiled, and keeping her and her staff apprised of developments throughout the proceeding. The Assistant Secretary shared her views with the Register orally in July, 2003, and in a letter dated August 11, 2003. Rather than address any particular proposals for exemptions, the Assistant Secretary commented on the rulemaking process itself, focusing exclusively on the Notice of Inquiry (“NOI”) published October 15, 2002.

The Assistant Secretary expressed general agreement with the discussion in the NOI regarding the definition of a “class of works,” but added that the intended use of the work or the attributes of the user will sometimes be critical to that determination. She also agreed with the Register that proponents of exemptions have the burden of proof and that and that the assessment of adverse impacts is to be determined *de novo*. However, she expressed some concern that the NOI may have described the proponents’ burden of proof as higher than required by the statute.

The Assistant Secretary appears to have misread the NOI, which stated the burden of proof using verbatim quotations from the legislative history of section 1201. In particular, the Assistant Secretary appears to have misunderstood the meaning of the requirement that proponents show that

<sup>2</sup> 17 U.S.C. 1201(a)(1)(D).

<sup>3</sup> Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 65 FR 64556 (October 27, 2000); <http://www.copyright.gov/fedreg/2000/65fr64555.pdf>. The Federal Register notice contained the recommendation of the Register of Copyrights and the determination of the Librarian.